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# File No. O Prisoners 142

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Legal DEPARTMENT

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The Prisoners Act 1900

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5C.

Submitted.

2. The Resident for Central India requests that prisoner George Martis may be transferred to Mhow Cantonment under section 40 of the Prisoners Act, 1900 to answer a charge of cheating pending against him in the Court of the District Magistrate, Mhhow The Prisoner, it appears, is undergoing a sentence in the Central Jail at Nasik. D.S.,H.D., considers (p. 8 ante) that Mhow does not form part of British India and therefore the realese of the prisoner under section 401 of the Criminal Procedure Code, 1898 is the only device left open. The R.L.A. is requested to confirm this view.

3. Sec. 40 of the Prisoners Act, 1900 provides inter alia that when a person is confined in a prison beyond the local limits of the appellate jurisdiction of the High Court, any Judge of such Court may, if he thinks that such person should be removed under this Part for the purpose of answering a charge of an offence or of giving evidencce in any criminal matter in such Court or in any Court subordinate thereto, apply in writing to the Provincial Govt. of the territories within which t e prison is situate, and the Provl. Govt. may, if it thinks fit, direct that the person be s so removed subject to such rules regulating the escort of prisoners as the Provl. Govt. may prescribe. This section is included in Part Ix of the Act which deals with inter alia with the attendance of prisoners in Court. The Court included croner and any officer, lawfully exercising the civil, criminal or revenue jurisdiction (see Definition in ection 2(a). But the "Court" would, however, be interpreted to mean a Court established by law in British India and mot a Court in a Native State (Cf. R.LL.A.'s opinion 7142, dated 13.7.39) Please see the definition of the Term

term"British India" in section 3(7) of the General Clause Act, 1897. Though Mhow is a Cantonment administered by the Governor General in Council (Machpherson's British Enactments in force in India Vol. III p.23), it does not appear that it forms part of British India (Cf. 10 Bom. 186 14 B.L.R. 876; 33 Cal. 219 and R.L.A.'s opinion No. 2032, d dated 22.2.39). As the provision in section 40 of the Prisoners Act, 1900, is intended only for removal of prisoners from one Province to another Province within the territories of the British India, the only course left open is to suspend the execution of the prisoner's ~~xxxxx~~ sentence under section 401 of the Crim. Proc. Code and send him under escort to the Jail Manual, Part I does not apply to the present case. The view taken by the D.S., H.D., at p. 8 ante is correct.

Id/- P.S.Nadkarni.

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Office of the R.L.A.

It is true that action under section 40 of the Prisoners Act, 1900, is not possible but attention is invited to the amended section 29(1) of that Act. Provided there is a prison at Mhow maintained by or under the authority of the Crown Representative, action under that section may be feasible.

Id/- P.N.M.

Remembrancer of Legal Affairs.

U.R. to S.D., No. 6898, dated the 24th August 1942.

PSM. 4/5
4C

L.D.No. 10872, D/- 19/10/42.

Submitted.

2. Please see R.L.A.'s opinion No.6898, dated 24-8-1942 and the notes underlying. In this opinion H.D. was advised that section 40 of the Prisoners Act, 1900, will not apply as the prisoner was to be removed to Mhow cantonment, a place outside British India. But attention of that Deptt. was invited to the amendment sec. 29(1). The Resident for Central India who was informed by H.D. in terms of this opinion (p.17ante) states that sec. 40 does not require that the prison to which removal of a prisoner is sought should be situated in British India; that on two occasions in the past such removal was consented to by this Govt. and that Govts. of Madras, Central Province and Berar have acceded to his similar requests. The papers are shown to the R.L.A. by D.S.,H.D., presumably for reconsideration of his opinion referred to above.

3.. In view of the letter from the Resident for Central India, at p. 19 ante, the R.L.A. is requested to reconsider the view taken by him in his opinion No. 6898, dated 24-8-1942. The Resident has not mentioned any fresh grounds for modifying the view taken by the R.L.A. in the opinion referred to above. Merely because on two occasions in the past such removal was consented to by this Govt. and also by two other Provl. Govts., it is not advisable for this Govt. hereafter to go by default. The provision in sec. 40 of the Prisoners Act, 1900, is intended to be made use of in cases where a court in one Province requires the removal of person imprisoned in the territories of another Province within British India. (Cf. R.L.A.'s opinion No. 7242, d dated 13/7/1939) Please see also definitions of the words "court" and "prison" in section 2 of the Act. H.D., may be informed that the R.L.A. sees no reasons to modify the view taken by him in his opinion referred to above.

Sd/- P.S.Nadkarni
26/10

S.A.S.

As at A.
Id/- B.D.M.
27/10

A.L.R. Please consider the effect of the application of the Prisoners Act to Mhow.

Id/- R.T.K.

Resubmitted.

2. By Govt. of India, P.D. Notn. No. 36-Fed-I, dated 13-2-1937 issued in exercise of the powers conferred by the Indian (Foreign Jurisdiction) Order in Council, 1937 the Crown Representative has made the Central Indian Administered Areas(Application of ~~xxxxxxxxxxxxxxx~~ Laws) Order, 1937 for application of certain of the enactments mentioned in the fist column of the schedule to the Administered Areas, subject to modifications and restrictions specified in the second column thereof. The Order in Council issued in 1937, referred to above, amends the Indian (Foreign Jurisdiction)Order in Council, 1902 . Para. 2 of the latter order prescribes the limits of the order to which it applies namely, the territories of India ~~xxxxx~~ outside British India, and any other territories which may be declared by His Majesty in Council to be territories ~~x~~ in which jurisdiction is exercised by or on behalf of His Majesty through the Governor General of India in Council etc. Para 4(a) empowers the G.G. in C. to make rules and orders for determining the law and procedure to be observed whether by applying with or without modifications all or any of the provisions of any enactment in force elsewhere or otherwise. As ~~x~~Mhow is outside British India, it has become necessary to apply the Prisoners Act, 1900 to this area subject to certain modifications and restrictions. By its application it did not provide for transfers of Prisoners from British India to places outside British India, such as Mhow. The fact that an order is issued under the Indian (Foreign Jurisdiction) Order in council 1937, supports the view taken by the R.L.A. in the above opinion, that Mhow is outside ~~x~~ British India.

Sd/- P.S.Nadkarni.

30-10

S.A.S.

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The Prisoners Act, 1900 is now been disclosed to have been applied to the Administered Areas including Mhow. (see the Central India Administered Areas(Application of Laws) Order 1937 . Gazettee of India, April 17/1937 Part I at p. ~~x~~ 26). By virtue of para 5 of the said order, S.40 of the

S.40 of the Act; in it application to the Administer. areas, must be construed as if the reference therein to High Court included the Court of the Resident. In the Present case the Resident having applied to Govt. for transfer of the prisoner George Martis to Mhow to answer a charge made against him in the Court of the Dist. Magistrate Mhow, Government can take action under act. 40.

Id/- B.G.M.
3/11.

A.L.R.

I do not agree with S.A.S.

2. It appears that the Resident for Central India in his letter at p. 19 ante urges two grounds for reconsideration of Govt.'s decision taken on the R.L.A.'s advice that section 40 of the Prisoners Act, 1900, cannot be resorted to for the transfer of George Martis, a prisoner in Nasik Jail, to answer a charge of cheating pending against him in the court of the District Magistrate, Mhow. The first ground is that on two occasions in the past such removal was consented to by the Bombay Government and Government of other Provinces have also acceded to such requests. The second ground is that the Prisoners Act,1900, has been applied to the administered area of Mhow by the Central India Administered Areas (Application of Laws) Order, 1937.

The fact that ontwo occasions in the past t is Govt. acceded to the request of the Resident for the transfer of a prisoner or that other Provl. Govts. also acceded to similar request of the Resident would afford no justification for compliance with the present request of the Resident if section 40 of the Prisoners Act, 1900, has no application. It is true that the Prisoners Act has been applied to Mhow by the Central India Administered Areas (Application of Laws) Order, 1937; and by virtue of para 5 of that order references to "Provincial Government" and "High Court" in Prisoners Act will have to be construe-

references to "Resident" and "Court of Resident", respectively. Reading section 40 with aforesaid modification it will be clear that the Resident of Mhow can apply for such purpose only to the Resident of the territories within which the prison is situate. Obviously, therefore, section 40 willhave no application for the transfer of a prisoner from the Bombay Province to Mhow. The R.L.A. may not, therefore, see any reason to modify his previous opinionNo. 6378 dated 24/8/1942.

Id/- R.T.K.

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PSM. 4/5
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Office of the R.L.A.

The R.L.A. is asked to reconsider his opinion No. 6898, dated 24th August 1942 in view of the letter dated 24th September 1942 from the Resident for Central India. That letter states that other Provincial Governments allow transfer of prisoners under section 40 of the Prisoners Act, 1900, and further that the Prisoners Act has been applied to the Administered Areas. It is clear that section 40 of the Act as it stands does not provide for the transfer of prisoners from British India to the Administered Areas. So far the matter does not require reconsideration. But the order applying the Act to the ~~warden~~ Administered Areas authorises certain changes to be made in the wording of the Act. The question now is whether section 40 in view of that order can be read as permitting such transfer. This order is a a new element in this matter and the R.L.A. was not apprised of it when expressing is former opinion.

2. The order in question is the Central India Administered Areas(Application of Laws) Order, 1937, and is published in the Political Department Notification No. 36-Fed. I, dated the 13th April 1937. Clause 3 of that order provides that the ~~re~~enactments mentioned in the first column of the Schedule to the order shall apply to the Administered Areas subject to the modifications and restrictions specified in the second column thereof and to the provisions of this order. "Administered Areas" is defined in clause 2 ~~a~~ as the cantonments of Mhow and Neemuch and three other areas. The Prisoners Act, 1900 is one of the enactments mentioned in the first column of the Schedule. It is clear therefore that the Prisoners Act, with certain modifications, has been applied to Mhow cantonment. So far as section 40 of the Prisoners Act is concerned ~~x~~ the second column of the first Schedule to the order specifies no. ~~and~~ modifications or restrictions. But clause 5 of the order provides generally that the enactments applied by the order shall, except where the context otherwise requires, be construed as if references therein to the authorities, gazette and territories mentioned in the first column of the table hereinunder printed were references to the authorities, gazette and territories respectively mentioned opposite thereto in the second column of the said table. According to that table "Resident" is to be substituted for " "Provincial Government" and "Court of the Resident" for "High Court". Certain other substitutions are therein authorised.

But so far as section 40 of the Prisoners Act is concerned the only terms which can be affected by the ~~xx~~ substitution clause are "Provincial Government" and "High Court". The words "Where the context otherwise requires" in clause 5 show that the substitutions are not to be made authomatically in every case, but that discretion is given to modify in accordance with the requirements of the conte t. Thus in considering whether and how section 40 ~~xxxxxxxxx~~ is to be modified, there are four possibilities; The first is to leave se tio 40 unchanged. Perhaps that possibility may be dismissed at once since it would make section 40 of no effect in the Admi istered Areas. The second possibility is to change both terms. The objection to that course arises from the fact that the Court of the Resident must be taken to mean the Court of t e Resident for Central India, Since "Resident" is defined in clause 2 of t e order as the Resident for Central India. There would be no point in the Resident's Court askin the Resident to transfer a prisoner who was outside the authority of both the Resident and his Court. The third course is to substitute "Court of the Resident" for "High Court" and leave "Provincial Government" unchanged. That would provide for the transfer of prisoners from British India to the administered Areas. The fourth course is to leave "High Court" unchanged and substitute "Resident" for "Provincial Government". That would provide for the transfer of prisoners from the Administered Areas to Mhow. Both these courses afford reasonable results. But it is by no means clear which of these two courses is to be adopted. The mere fact that there is a choice ~~choice~~ suggests that the power of modification given by clause 5 of the order has been exceeded. In a doubtful matter like this one would have expected the manner of modification to be clearly stated in the second column of the First Schedule to the order, as has been done in the case of several other sections of the Act. Assuming however, that the discretion by clause 5 has not been exceeded, there is some indication that t e third course is the correct one. Section 29(1) of the Act as specifically modified in t e second column of the

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column of the Schedule does provide for the transfer of prisoners from the Administered areas to any prison in British India. There is nothing in the section itself to show that it includes, either in its application to British India or to the Administered Areas, removals for the purpose of further trial. The fact that section 40 does make specific provision for such removals in certain circumstances suggests that section 29 does not include such cases. But assuming that section 29(1) as modified does permit the transfer of prisoners from the Administered Areas for further trial in British India, then it is reasonable to hold that section 40 is to be modified so as to permit the transfer of prisoners from British India for trial in the Administered Areas. Section 40 so modified would read x then read then as follows:-

"40. Where a person is confined in a prison be ond the local limits of the appellate jurisdiction of a Court of the Resident, any Judge of such Court may, if he thinks that such person wo ld be removed under this Part for the purpose of answering a charge of an offence or of giving evidence in any criminal matter in such Court or in any Court subordinate thereto, apply in writing to the Provincial Government of the territories within which the prison is situte, and the Provincial Government may, if it thinks fit, direct that the person so removed, subject to such rules, regulating the escort of prisoners as the Provincial Government may prescribe".

There is thus some ground for holding that section 40 in its applications to the Admnistered Areas does permit of the Prisoner('s transfer. But the reasoning is based on one or two assumptions about whose legitimacy there is considerable doubt. In this doubtful matter administrative convenience may have the last word until the decision of a competent Court is given. It may however, be pointed out that the application for transfer under section 40 ought to be from a Judge of the Resident's Court or whoever presidestherein not from the Resident in his executive capacity.

Id/- P.N.M.
9/12
Remembrancer of Legal Affairs.

U.R. to H.D.,No., 9866, dated the 10th December 1942.

PSM. 4/5 4C